APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAN EMIL DONATO,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 18,161
Jan. 24, 1963

Upon Appeal from the United States District Court
for the Southern District of California
Central Division

Before: CHAMBERS, MERRILL and BROWNING, Circuit Judges

PER CURIAM

Appellant stands convicted of refusal to submit to induction under the Universal Military Training and Service Act, 50 U.S.C., § 462. He asserts that he is a conscientious objector and that there was no basis in fact for his classification as 1-A by his local board. The United States asserts that appellant failed to take an administrative appeal from the local board's ruling; that appellant accordingly has failed to exhaust his administrative remedies and that this should preclude resort to the courts upon the merits of his claimed exemption. Appellant asserts that he had intended to take an administrative appeal and that his failure to do so was due to the fact that he had been called to duty as a fire fighter in the Los Angeles area; that under these circumstances the exhaustion of remedies rule should be relaxed.

In Donato v. United States, 9 Cir., 1962, 302 F.2d 468, these issues were presented to this court and the applicable law was there discussed. It appeared that the district court, in finding appellant guilty, had applied the exhaustion of remedies rule. It did not appear from the record that the court had given consideration to the circumstances under which appellant had failed to take his administrative appeal. We deemed essential to informed appellate review an expression by the district court as to whether it had considered the excuses presented by appellant for his failure to exhaust his administrative remedies and directed the district court to render its decision upon the question whether under all the circumstances of this case a relaxation of the exhaustion of remedies rule would be just and proper.

This the district court has now done in a certificate to this court. That certificate states in part, "This court did consider the testimony and evidence presented by defendant, balanced the competing consideration; and concluded that under all of the circumstances of this case, a relaxation of the exhaustion of administrative remedies rule would not be just and proper. This court has reviewed the records and files of the case, including the reporter's transcript, and presently is of the same opinion."

The district court in its certificate also states that it disbelieved the appellant's statement that he intended to take an administrative appeal and concludes, "It is clear that the defendant's failure to appeal administratively was deliberate and intentional."

Appellant attacks the district court's reasons for its disbelief as outlined in its certificate. We find them to bear rationally on the issue of credibility.

Judgment affirmed.

(Endorsed) Per Curiam Opinion Filed Jan. 24, 1963.
Frank H. Schmid, Clerk.

APPENDIX B

Opinion

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.
JAN EMIL DONATO,
Appellee.

No. 17,473
Feb. 14, 1962

Upon Appeal from the United States District Court
for the Southern District of California
Central Division

Before: CHAMBERS, MERRILL and BROWNING, Circuit Judges

MERRILL, Circuit Judge

Appellant stands convicted of refusal to submit to induction under the Universal Military Training and Service Act, 50 U.S.C. § 462, and has been sentenced to serve three years' imprisonment.

Appellant is a member of Jehovah's Witnesses and asserts conscientious objection to military service. Notwithstanding his showing to this effect, the local board with which he had registered classified him 1-A rather than as a conscientious objector. After reporting for induction in response to the board's order, appellant refused to submit to induction.

Upon this appeal appellant contends that he had made out a prima facie case for a conscientious objector classifi-

cation of 1-O (50 U.S.C., § 456(j)), which case was not rebutted; that there was no basis in fact for the board's classification of 1-A; that under Estep v. United States, 1946, 327 U.S. 114, the board was without jurisdiction to classify him in this manner. While the United States disputes this, its principal contention upon this appeal is that appellant has failed to exhaust his administrative remedies through failure to take an appeal from the local board's ruling to the appeal board established by selective service regulations; and that this failure "prohibited the trial court from examining the propriety of the board's actions in classifying him as it did."

Appellant concedes his failure to exhaust his administrative remedies in this respect, but contends with substantial citation of authority that the exhaustion of remedies rule is not an inflexible rule but is one which may and should be relaxed by the courts in proper cases, at least where, as here, defendant did not interrupt the selective service process, but pursued it to the point where he could go no farther without abandoning his claim of right, reporting for induction, completing his physical examination, and refusing only at the final step of submitting to induction. Compare Falbo v. United States, 1944, 320 U.S. 549, with Estep v. United States, 1946, 327 U.S. 114. The United States, in response, asserts that however flexible the rule may be in other circuits this court has refused to regard it as other than inflexible.

This court's strict adherence to the rule that administrative remedies must be exhausted has been (as in Prohoroff v. United States, 9 Cir., 1958, 259 F.2d 694, and Evans v. United States, 9 Cir., 1958, 252 F.2d 509) in cases where failure to appeal appeared to be a deliberate and intentional rejection of the administrative review which had been provided. An area does remain, however, within

which relaxation of the rule can be found to be just and proper. Each case thus presents the question whether the particular circumstances which exist make the case an appropriate one for relaxation of or strict adherence to the rule.

Here the appellant testified that he had every intention of appealing within the prescribed period; that his failure to do so was due to the fact that he had been summoned to firefighting duty and that upon his return, the period having expired, he believed his appeal rights to have been lost.

The balancing of the competing considerations which a case presents should take place at the trial level where the true facts may be found and their significance weighed. The record does not disclose that such consideration was given in this case. Indeed, if the district court accepted the contentions of the United States, it would have regarded such consideration as unavailable to it. Under these circumstances, an expression by the district court is essential to informed appellate review.

Accordingly, this case must be remanded to the district court for such, if any, hearing as the court, for its assistance, may prescribe and for decision upon the question whether, under all of the circumstances of this case, a relaxation of the exhaustion of remedies rule would be just and proper.

If, upon such consideration, the district court should decide that the rule should not apply under the circumstances of this case, it shall render its decision upon the merits respecting the asserted lack of basis in fact for the board's classification. If the decision of the district court is that the rule should apply, it shall express its opinion to this effect. In either event, a new final judgment

should be rendered preserving rights to further appellate review.

Reversed and remanded with instructions that the judgment be set aside and for further proceedings in accordance with this opinion.

CHAMBERS, Circuit Judge, dissenting:

No particular harm is done here in reopening a judge tried case to probe further into Donato's excuse for not taking his administrative appeal. I think Prohoroff and Evans, supra, were correctly decided on their facts. I would not contend that there are no valid excuses for failure to take an administrative appeal. But, I think on the face of it, Donato has already shown his excuse too weak. Therefore, I dissent.

(Endorsed) Opinion and Dissenting Opinion Filed Feb. 14, 1962.

Frank H. Schmid, Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, February 26, 1963.

Before: CHAMBERS, MERRILL & BROWNING, Circuit Judges.

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed February 23, 1963, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1962

JAN EMIL DONATO,
Petitioner,

vs.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

April 15 ....., 1963.

s/ W. O. DOUGLAS,
Associate Justice of the Supreme Court of the United States

Dated this 22nd day of March, 1963.